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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,

Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION AND SUPPLEMENTAL APPENDIX

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1. ***Riggs v. Scindia Steam Navigation Company, et al.*, ___ F.2d ___, U.S. App. LEXIS 28861 (9th Cir, 1993), decided subsequent to the filing of the Petition in the instant case, demonstrates the extent of the conflict in circuits in this area of the law and the need for this Court to review and resolve the conflict.**

On November 8, 1993, subsequent to the filing of the Petition in this case, the Court of Appeals for the Ninth Circuit filed an Opinion in *Riggs v. Scindia Steam Navigation Company, et al.*, ___ F.2d ___, U.S. App. LEXIS

28861 (9th Cir, 1993). The Opinion in *Riggs* bears strongly on the issues raised by the instant Petition, and, indeed, responds to many of the assertions made in Respondent's Brief in Opposition.[1]

In *Riggs, supra,* the Ninth Circuit reaffirmed not only its holding, but also the reasoning of its decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), and extended the *Turner* holding to hazardous conditions in a cargo stow which were "open and obvious." The Court concluded:

IV. Conclusion

Turner holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that the duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. (16c) (Emphasis by underlining supplied)

In *Riggs*, the Ninth Circuit, revisited its decision in *Turner*. The Court first noted, as it did in *Turner*, that Section 905(b) of the Longshore and Harbor Workers Compensation Act does not bar a shipowner from obtaining a recovery from a foreign loading stevedore (as distinguished from the injured longshoreman's own employer) (6c), a point which was ignored by the Third Circuit in the *Derr* decision and which is not addressed by Respondent in its Brief in Opposition. In contrast to the Third Circuit's ignoring of the right of a vessel to bring an action against a foreign loading stevedore whose negligence may have creat-

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1. Since the Opinion in *Riggs v. Scindia Steam Navigation Company, et al.* is not yet officially reported, we have attached a copy of the Court's Slip Opinion as a supplemental appendix hereto at pages 1c through 17c.

ed a hazardous condition, the Ninth Circuit, in *Riggs*, emphasized the importance of this remedy as an instrument of accomplishing the Congressional goal of encouraging vessel safety. The Ninth Circuit stated, in words which would be equally applicable to the instant case:

> *Turner's* holding that the turn over duties of safe condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. 581 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of process of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.
>
> We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, where we reaffirmed our holding and reasoning in *Turner*. "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir. 1991) (10c) (Emphasis by underlining supplied)

The *Riggs* opinion also specifically rejected the Third Circuit's position that the term "work space" did not encompass a vessel's cargo stow, stating, at footnote 5:

. . . Several Circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986)(turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n. 7 (3rd Cir. 1992)(turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit. (8c) (Emphasis by underlining supplied)

Finally, the *Riggs* opinion rejects, in rather strong language, the contention that there should be a difference between the ship's responsibility for defective conditions in a cargo stow which are obvious and its responsibility for defective conditions which are hidden, stating:

. . . As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel -- that a duty exists as to concealed defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards. (13c) (Emphasis by underlining supplied)

The decision of the Ninth Circuit in *Riggs, supra,* stands in stark contrast to the Third Circuit's holding in *Derr*, under which the instant case was decided, that the ship has no duty to inspect the manner in which cargo is stowed by a loading stevedore and has no responsibility for conditions which are "open and obvious." If it were not already clear, the *Riggs'* decision demonstrates how deep is the conflict in circuits in this area of the law and the necessity for this

Court granting a Writ of Certiorari and resolving the conflict.

2. The instant case fully presents for review all the issues on which there is a conflict in circuits relating to a shipowner's liability for improperly stowed cargo. Summary judgment would not have been granted to Respondent under the law as it exists in the Fourth, Fifth and Ninth Circuits.

Respondent devotes a considerable portion of its Brief in Opposition to arguing that the Petition should be denied because, on the facts of the case, Respondent would have been entitled to summary judgment had this case been brought in the Fifth or Ninth Circuits. The principle thrust of Respondent's argument is that, even though it supplied the plastic to the loading stevedore, there is no evidence that it knew that the plastic had been placed under the stow of cocoa beans. This argument is without merit as, contrary to Respondent's assertions, there is ample, indeed compelling, evidence that the crew of the ship knew, or at least had reason to know, that the plastic had been placed under the cocoa beans.

Initially there is the testimony of the ship's Captain that the crew observed the cargo loading operation and, if plastic had been placed on the deck under the stow of cocoa beans, these crew members should have seen it (17a). In any other Circuit but the Third Circuit, this testimony, standing by itself, would have created an issue of fact as to whether the crew had constructive knowledge that plastic had been placed on the deck under the stow of cocoa beans, *see Bueno v. United States*, 687 F.2d 318, 320 (9th Cir. 1982). Respondent, however, argues that this testimony as to observations should not be considered because to do so would be tantamount to imposing a duty on the shipowner to "supervise" the stevedore (see Respondent's Brief in Opposition at pages 9-10). Nothing could be further from the truth. The issue is not whether the shipowner has a duty to supervise the stevedore, but, rather, what "knowledge" did the shipowner have, *Ibid.*

If a shipowner, as did the Respondent in the instant case, directs its crew members to observe cargo loading operations, can it escape responsibility for what those observations disclose on the grounds that it had no duty to make the observations? It is not the making of an observation that triggers a duty of care -- it is the "knowledge" of an unsafe condition acquired by that observation which triggers the duty of care.

Whether one characterizes the practice of the crew of a ship to watch cargo operations as being "observations" or "inspections" is a matter of semantics -- a distinction without a difference. How a defendant may have acquired knowledge of an unsafe condition -- whether by "observation" or "inspection" -- is irrelevant once it is established that the defendant had reason to have the knowledge. For this reason, Respondent can not escape responsibility for knowledge of what the crew admittedly should have observed on the basis that it was not under any duty to make the observations. Under the decisions in *Woods, supra, Turner, supra,* and *Riggs, supra,* a shipowner would have duty to make "reasonable" inspections of cargo loading operations. That is what the crew of the Respondent's ship actually did in this case. Having done so, whether one calls what the crew did an act of "observation" or an act of "inspection," Respondent must be deemed to have knowledge of what such "observations/inspections" would reasonably disclose.

Respondent's final argument is that the fact that it supplied the plastic to the loading stevedore does not give rise to an inference that it knew the purpose for which the plastic would be used because, in Respondent's words, "plastic could be used for a myriad of purposes during the loading of cargo aboard a vessel" (see Respondent's Brief in Opposition at page 14). We respectfully submit that this argument is incredulous, particularly when one considers the evidence of record in this case.

First, contrary to the assertion made at page 4 of Respondent's Brief in Opposition, the evidence establishes that the Captain of the ship did require the loading stevedore to

put a separation material under the cocoa beans. Initially, under the direct examination of counsel for Respondent, the ship's Captain testified that the decision to place a separation material under the cocoa beans was made by the loading stevedore. However, subsequently, under cross-examination, he admitted that the ship required this to be done and the loading stevedore had no discretion not to do it.[2]

Secondly, it was admitted that the ship supplied the loading stevedore with all the materials needed to load the cargo, whether it be wood, paper or plastic. It was on the basis of this testimony that Respondent was forced to admit that it supplied the plastic that was under the cocoa beans at the time Petitioner was injured.

Third, while the ship's Captain stated that it would be improper to use plastic for loading cocoa beans, when asked what the plastic which the ship carried was used for, he did not mention any "myriad of purposes", but rather stated that it was used in connection with the stowage of drums containing corrosive chemicals.[3]

Fourth, the ship's stowage plan for the voyage in progress at the time Petitioner was injured does not show that any drums containing corrosive chemicals were being carried and, moreover, the ship's Captain testified that the only cargo, other than cocoa beans, ever loaded at Guayaquil was bananas (18c), so that plastic would not normally be needed by the stevedore in Guayaquil.

While counsel for Respondent argues that there were a "myriad" of purposes for which plastic might be used in

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2. The testimony of the ship's Captain on this point is set forth in the Supplemental Appendix submitted herewith at 18c-19c.

3. The testimony of the ship's Captain on this point is set forth at 3b-5b and 18c.

stowing cargo, there is no evidence anywhere in the record in this case of any alternative uses for the plastic other that the testimony of the ship's Captain that the ship carried plastic for use in loading drums of corrosive chemicals. Since no drums of corrosive chemicals were loaded in Guayaquil, if the ship supplied the plastic to the loading stevedore, as it admits it did, it could only have been supplied for use in loading the cocoa beans. In addition, since the ship required that the loading stevedore in Guayaquil put a separation material under the cocoa beans, and since the plastic carried by the ship was capable of being used for this purpose (albeit that such use was improper), and since there was no other apparent purpose for which the plastic would be used, Respondent's contention that it did not know the use to which the plastic would be put is -- to put it mildly -- not credible. By way of example, given the testimony that plastic would not normally be used in the loading of cocoa beans, would not a "reasonably careful" operator of a ship, *see Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236, 244 (5th Cir. 1981), when asked by a loading stevedore for plastic, have inquired as to what use the plastic would be put? Respondent's argument that it gave the plastic to the loading stevedore without knowing the purpose for which the loading stevedore intended to use it is simply not believable. For purposes of a motion for summary judgment, which was the basis on which this case was determined in the court below, the evidence that the ship supplied the plastic, coupled with the evidence that the crew observed the loading operation and had the opportunity to observe if plastic was being placed on the deck under the stow of coca beans, was more than sufficient to establish the existence of a genuine issue of material fact as to whether the ship knew or had reason to know that the loading stevedore in Guayaquil was using the plastic as a separation material under the cocoa beans.

Under the decisions in *Woods, supra, Turner, supra,* and *Riggs, supra,* the shipowner's duty of reasonable care extends to unsafe conditions existing in a cargo stow of which the shipowner knows or has reason to know. There is ample evidence in the instant case that the unsafe condition which caused Petitioner's injuries -- the presence of the

sheet of plastic under the stow of cocoa beans -- was a condition of which the respondent either knew or had reason to know. Accordingly, this case clearly presents the issue on which the Third Circuit is in conflict with the decisions of the Fourth, Fifth and Ninth Circuits.[4]

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4. The suggestion by counsel for Respondent, at footnote 1 to Respondent's Brief in Opposition, that the Petition should be denied because Respondent has denied that it was in possession of the vessel is without merit and is misleading in that it fails to disclose that its claim that it was not in possession of the vessel was never determined in either the district court or by the Third Circuit and that no final order was ever entered in favor Empresa Maritima Del Estado which could be the subject of a Petition for a Writ of Certiorari.

The instant suit by Petitioner was filed against Respondent, Birkdale Shipping Co., S.A., on December 30, 1991. Counsel for Respondent filed an Answer in which they admitted ownership of the vessel but did not raise as a defense that the vessel was under a demise charter. Subsequently, on July 22, 1992, counsel for Respondent filed the instant motion for summary judgment which was only on behalf of Respondent, Birkdale Shipping Co., S.A.

Thereafter, counsel for Respondent advised counsel for Petitioner of the possible existence of a demise charter of the vessel to Empresa Maritima Del Estado (hereafter "Empresa"), at which point, because the statute of limitations was about to expire, Petitioner filed a protective action against Empresa. Counsel for Respondent herein then entered their appearance and filed an Answer [redacted] on behalf of Empresa.

The district court judge before whom the motion for summary judgment was pending was advised of the existence of a possible dispute over who was the operator of the vessel but, in ruling on the motion, specifically declined to rule on this dispute. Instead, he stated, at footnote 1 to his opinion of October 1, 1992, as follows:

> 1. The operator of this vessel on the date of the alleged injury is in dispute. This court will not deal with this issue for purposes of this motion. (1a) (Emphasis supplied)

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

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...Continued...

No separate motion for summary judgment was ever filed on behalf of Empresa, and, in ruling on the motion for summary judgment, the district court judge entered judgment only in favor of Respondent, Birkdale Shipping Co., S.A. (6a). It was this judgment that the Third Circuit affirmed by Judgment Order (10a-11a).

The status of the record in this case at the present time is that Respondent's claim that it was not the possessor of the vessel is an unresolved issue which, should this Court grant the Petition and reverse the decision below, would then have to be determined along with other issues going to the merits of Petitioner's claim. If it should be determined that Empresa, rather than Respondent, was the possessor of the vessel at the time Petitioner was injured, then the action would proceed against Empresa, as the action against it is still pending. There would be no prejudice to Empresa because it is represented by the same counsel now representing Respondent herein.

SUPPLEMENTAL APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL RIGGS,
Plaintiff-Appellant,
v.
SCINDIA STEAM NAVIGATION COMPANY and THE SHIPPING CORPORATION OF INDIA,
Defendants-Appellees.

No. 92-55139
D.C. No.
CV-90-4812 HLH
OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
July 15, 1993—Pasadena, California

Filed November 8, 1993

Before: Harlington Wood, Jr.,* Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Reinhardt; Concurrence by Judge Rymer

SUMMARY

Admiralty and Marine/Workers Compensation/Torts

The court of appeals reversed a district court judgment and remanded. The court held that longshoreworkers who are

*Honorable Harlington Wood, Jr., Senior United States Circuit Judge, Seventh Circuit Court of Appeals, sitting by designation.

injured on board vessels while off-loading cargo stowed in an openly and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels.

Appellant Michael Riggs worked as a longshoreman assigned to unload cargo from a vessel owned by appellee Scindia Steam Navigation Co., Ltd., and time-chartered by appellee The Shipping Corp. of India (SCI). The on-loading foreign stevedore improperly stowed the cargo in an openly and obviously hazardous manner. Riggs was injured while unloading the cargo.

Riggs sued Scindia and SCI (collectively, the Vessel) under the Longshore and Harbor Workers' Compensation Act (LHWCA), claiming that the Vessel negligently failed to provide him a reasonably safe place to work. The district court granted summary judgment to the Vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious to the longshoreworkers. Riggs appealed, contending that the Vessel's "turn over duty of safe condition" extended to open and obvious cargo hazards that existed at the time the vessel was turned over to the longshoreworkers for unloading.

[1] A Ninth Circuit case, *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), squarely holds that the turn over duty of safe condition encompasses concealed hazards in cargo on-loaded by foreign stevedores. [2] *Turner*'s holding rested on the conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. The court reasoned that the off-loading longshoreworker could not exercise any control over the on-loading foreign stevedore; only the Vessel could do so. In addition, the court noted that in many cases the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court.

[3] All of the considerations on which the court relied in *Turner* are equally applicable in the case of open and obvious

defects. Moreover, the Ninth Circuit has previously rejected the argument that the duty of safe condition does not extend to open and obvious defects — at least insofar as a vessel and its equipment are concerned. [4] The principle that a vessel's failure to correct an open and obvious defect may constitute unreasonable conduct leading to liability has equal force with respect to hazards in the stowage and hazards occurring elsewhere on a vessel. [5] Thus, the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

Circuit Judge Rymer concurred, stating that it is unclear that imposing a turn over duty of care to protect stevedores from poor cargo conditions squares with the restrictive rules of liability of shipowners to stevedores envisioned by the LHWCA.

COUNSEL

Marc Coleman, Middleton & Coleman, San Pedro, California, for the plaintiff-appellant.

Dawn Schock, Keesal, Young & Logan, Long Beach, California, for the defendants-appellees.

OPINION

REINHARDT, Circuit Judge:

We decide here that longshoreworkers who are injured on board vessels while off-loading cargo stowed in an open and obviously hazardous manner by foreign stevedores may maintain negligence actions against the vessels. The district court reached a contrary conclusion. Accordingly, we reverse the grant of summary judgment to the vessel, and remand.

I. *Background*

On October 2, 1989, Michael Riggs sustained injuries while working as a longshoreman for Stevedoring Services of America. Riggs and his longshore gang were assigned to unload cargo from the M/V Jalagopal. The Jalagopal was owned by Scindia Steam Navigation Company, Ltd. ("Scindia") and time-chartered by The Shipping Corporation of India ("SCI"). The vessel's cargo, which had been loaded overseas by a foreign stevedore, consisted of three-inch steel pipe tubing bundled together and covered with slippery plastic wrapping. There was uncontested evidence, including expert testimony, that the on-loading stevedore had improperly stowed the cargo and that the pipes were strewn throughout the hold in an openly and obviously hazardous manner.[1] Riggs injured his back when he slipped between two pipe bundles during the unloading operations.

Riggs brought suit against Scindia and SCI (collectively "the vessel")[2] under section 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. section 905(b), claiming that the owner and the time-charterer of the Jalagopal had negligently failed to provide him a reasonably safe place to work. Riggs contended that the vessel's negligence consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore. The district court granted summary judgment to the vessel on the basis that it had no legal duty to prevent or alleviate the unsafe conditions in the cargo hold, because the dangers were open and obvious

[1]The pipes were stowed without dunnage (loose materials placed within the cargo to keep it from shifting) or shoring (vertical supports).

[2]As explained *infra*, section 5(b) of the LHWCA establishes the liability of "vessels" to injured longshoreworkers. Because a "vessel" includes its owner and charterer, both Scindia and SCI are potentially liable to Riggs. *See* 33 U.S.C. § 902(21); *see also Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1542 (9th Cir. 1991) (same standards of care apply to shipowners and charterers). The question of any contractual indemnity between Scindia and SCI is not before us.

to the longshoreworkers. We have jurisdiction under 28 U.S.C. section 1291, and we review the grant of summary judgment *de novo*.

II. *Legal Framework*

A. *The 1972 Amendments to the LHWCA*

Prior to 1972, vessels were strictly liable under the maritime doctrine of unseaworthiness for any injuries sustained by longshoreworkers due to unsafe on-board conditions. Although absolutely liable to the injured longshoreworkers, vessels were able to shift the cost by suing the stevedore-employers on the theory that they had breached an expressed or implied warranty of workmanlike performance. Because this system resulted in much unnecessary litigation, Congress amended the LHWCA in 1972 in an attempt to bring it into conformity with the practical realities of the maritime world. *See* H.R. Report No. 1441, 92 Cong., 2d Sess., *reprinted in* 1972 U.S.C.C.A.N. 4698, 4702-04 (describing purpose of P.L. 92-576, Oct. 27, 1972, 86 Stat. 1251).[3]

The 1972 amendments gave longshoreworkers a no-fault workers-compensation remedy against their stevedore-employers. 33 U.S.C. § 904. The amendments abolished a vessel's absolute liability to an injured longshoreworker under the unseaworthiness doctrine, but retained a statutory action against vessels for *negligence*. § 905(b).[4] In addition, the

[3]The Senate Report, S. Report No. 1125, is identical in all relevant respects to the House Report.

[4]That section provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone else entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this section and the employer shall not be liable to the vessel for such damages directly or indirectly

amendments barred vessels from seeking indemnity from the longshoreworker's "employer". *Id.* However, an "employer" is defined in such a way as to exclude foreign stevedores. *See* § 902(4). Thus, by its terms section 905(b) does not prohibit a vessel from obtaining a recovery against a foreign on-loading stevedore and does not allocate liability between those two entities.

The House Report states that the result of the 1972 amendments would be "to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third-party damages action is concerned." 1972 U.S.C.C.A.N. at 4703. The Report concludes:

> Permitting actions against a vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

Id. at 4704. However, Congress did not specify the conditions under which a vessel could be liable for a breach of its duty of care, but instead left this task for the courts to resolve through the "application of accepted principles of tort law and the ordinary process of litigation." *Id.* The courts have pro-

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> and any agreements or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

Section 933 *inter alia* provides that in certain situations the stevedore-employer is assigned the longshoreworker's right to sue the vessel for compensation. *See Carpenter*, 924 F.2d at 1541-42.

ceeded to accept that responsibility, and this decision simply constitutes one further step in that process.

B. *A Vessel's Duties to a Longshoreworker*

Any discussion of the scope of the duties imposed by section 905(b) must begin with *Scindia Steam Navigation Company, Ltd. v. De Los Santos*, 451 U.S. 156 (1981). In *De Los Santos*, a longshoreman was injured while loading cargo into the ship's hold. The cargo fell from a pallet suspended by a winch, which was part of the ship's gear. The winch's braking mechanism had allegedly been malfunctioning for two days prior to the accident. In defining the vessel's duty of reasonable care under the circumstances the Court drew a line between "turn over" duties, which arise before the vessel is turned over to the stevedore and its longshoreworkers, and the other duties that arise after the vessel is turned-over. The case before us involves only the first type of duty—that which arises prior to turn over.

De Los Santos determined that a vessel's turn over duties extend *at least* to: 1) having the ship, its equipment, gear and tools, and the work space to be used in stevedoring operations in such condition that an experienced stevedore can by exercising reasonable care carry on its cargo operations with reasonable safety ("the turn over duty of safe condition"); and, 2) warning the stevedore of *hidden* dangers that are known to the vessel or should have been known to it in the exercise of reasonable care with respect to any hazards on the ship, in its equipment, gear or tools, or in the work space ("the turn over duty to warn"). 451 U.S. at 167; *Bjaranson v. Botelho Shipping Corp.*, 873 F.2d 1204, 1207 (9th Cir. 1989). It is the first turn over duty (safe condition) that is at issue here.

[1] Riggs contends that the turn over duty of safe condition extends to cargo hazards that exist at the time of turn over, both "open and obvious" and concealed. The vessel argues that under *De Los Santos* and the law of this circuit the turn

over duty of safe condition extends only to the vessel and its equipment and not to its cargo at all.[6] The vessel is clearly wrong, at least in part. Ninth Circuit precedent squarely holds that the turn over duty of safe condition encompasses *concealed* hazards in cargo on-loaded by foreign stevedores. *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982). Therefore, the only question for us to resolve is whether it extends to open and obvious defects in such cargo as well. We hold that it does.

III. *Discussion*

A. Turner v. Japan Lines *Holds that the Turn Over Duty of Safe Condition Extends to Concealed Cargo Hazards Created by Foreign On-Loading Stevedores.*

In *Turner*, which was decided several months after *De Los Santos*, we rejected the argument that a vessel's turn over duties do not extend to the cargo stow. *Turner* involved an off-loading longshoreworker who was injured when a stack of plywood collapsed beneath him. Expert testimony indicated that the plywood had been improperly stowed by the on-loading foreign stevedore. We held that the vessel could be sued for failing to "protect" the injured longshoreworker against concealed cargo dangers, created by a foreign on-loading stevedore, of which the vessel knew or should have

[6]In discussing the scope of the turn over duties in *De Los Santos*, the Supreme Court explicitly stated that the duty to warn extends to the "work space" but also implied that the duty of safe condition does so as well. *See* 451 U.S. at 167. Several circuits have concluded that the duty of safe condition extends to the "work space", but there is some disagreement as to whether the cargo falls within the term "work space". *Compare Theriot v. Bay Drilling Corp.*, 783 F.2d 527, 535 (5th Cir. 1986) (turn over duty of safe condition extends to ship's work space, which includes cargo) *with Kirsch v. Plovidba*, 971 F.2d 1026, 1031 n.7 (3d Cir. 1992) (turn over duty of safe condition applies to "physical work space" but not cargo). As explained in text, Ninth Circuit law is in accord with that of the Fifth Circuit.

known, and which the vessel could, in the exercise of reasonable care, have "corrected" or warned of.[6] *Id.* at 1304.

Our statement in *Turner* that a vessel has a duty to "correct" concealed dangers in the cargo before turning the vessel over to the off-loading stevedore makes clear that our decision there encompassed the turn over duty of safe condition as well as the turn over duty to warn. Moreover, we have subsequently described *Turner* as setting forth a vessel's duty "to make the ship safe for longshoremen before turning the ship over to the stevedore." *See Ollstead v. Greenville Steamship Corp.*, 739 F.2d 1049, 1052 & n.2 (9th Cir. 1984); *see also Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 n.2 (9th Cir. 1990) (citing *Turner* in the context of a discussion of the turn over duty of safe condition).

In the decision we review here, the district court correctly recognized that *Turner* addressed the turn over duty of safe condition but erroneously limited the *Turner* rule to *concealed* cargo defects. The district judge stated:

> While *Turner*, *supra*, involved liability created by a condition of the stow, the facts of *Turner* involved a concealed defect and not an "open and obvious" one. Plaintiff has failed to cite any Ninth Circuit authority wherein the shipowner has been held liable for an unsafe condition of the cargo which was open and obvious to the longshoremen working the hold.

The district court was correct that there is no direct Ninth Circuit authority on point. Rather our decision is dictated by the logic of our precedents.

[6]Because the case before us, like *Turner*, involves a *foreign* on-loading stevedore, we have no occasion to decide, and express no opinion regarding, whether a vessel has a duty to correct or warn of dangers (whether concealed or open and obvious) created by a domestic on-loading stevedore who is not the employer of the off-loading longshoreworkers.

[2] *Turner*'s holding that the turn over duties of safe-condition and warning encompass non-obvious dangerous conditions in stowed cargo rested on our conclusion that such a rule would further the Congressional goal of safety that underlies the LHWCA. 581 F.2d at 1304. We reasoned that neither the off-loading longshoreworker nor his stevedore-employer could exercise any control over the on-loading foreign stevedore. Only the vessel could do so, by choosing a reliable foreign stevedore, supervising its work when necessary, and correcting concealed dangers or warning the off-loading stevedore of them. *Id.* Moreover, we noted that in many cases, the injured worker could not sue the foreign stevedore, who would be beyond the reach of the processes of a federal district court. All of these factors are equally applicable in the case of an open and obvious cargo defect.[7]

We noted in *Turner* another factor that is also equally applicable to both types of *cargo defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping SA*, wnere we reaffirmed our holding and reasoning in *Turner*: "The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully." 924 F.2d 1539, 1544 (9th Cir. 1991).[8]

[7]Because the injury in *Turner* was caused by a concealed cargo defect, there was simply no reason for us to discuss whether the same principle applies to open and obvious ones.

[8]In *Carpenter* we described *Turner* as holding vessels liable for their failure to "intervene" to protect the longshoreworker. 924 F.2d at 1539. Our use of the term "intervene" in *Carpenter* is somewhat confusing because, the "duty to intervene" is technically a post-turn over duty, *see, e.g., Bjaranson*, 873 F.2d. at 1207, and *Turner* involved a ship's duties at the time of turn over. Nevertheless, our intent to hold vessels liable for their negligence in connection with the actions of foreign on-loading stevedores and our reasons for doing so are clear.

Turner and *Carpenter* are fully consistent with *De Los Santos*. *Turner* simply resolves an issue not before the Court in the earlier case and *Carpenter* endorses that action. Because the accident in *De Los Santos* occurred while the domestic stevedore was *loading* cargo onto the vessel and the alleged negligence pertained to the vessel's equipment, the Supreme Court simply had no reason to consider the scope of a vessel's turn over duties with respect to improperly stowed cargo, let alone cargo improperly stowed *before* stevedoring operations began.[9]

The vessel incorrectly asserts that *Taylor v. Moram Agencies*, 739 F.2d 1384 (9th Cir. 1984), holds that the turn over duty of safe condition does not extend to defects in the cargo. In *Taylor*, a longshoreman was injured when he fell while unloading mung beans. The bags containing the beans were torn, and as the longshoreworkers unloaded cargo, the beans blew onto the deck, eventually causing Taylor to fall. After a bench trial, judgment was entered for the vessel. The district court specifically found that the turn over duty of safe condition had *not been breached* because the stowage of the bags was not unreasonably dangerous. 733 F.2d at 1386. We affirmed.

The vessel misconstrues our statement in *Taylor* that the turn over duty of "safe condition focuses on the character of the ship and its equipment—not on the nature of the cargo", *id.*, as a holding that that duty does not apply to cargo defects. This sentence must be read in light of our conclusion that the cargo constituted a safe stow and did not become dangerous until hazardous conditions arose following the commence-

[9]Moreover, *De Los Santos* was primarily concerned with a dangerous condition that *developed* during cargo operations *after* the stevedore had taken control. *See Ollstead*, 739 F.2d at 1052; *accord Kirsch v. Plovidba*, 971 F.2d 1026, 1029 (3d Cir. 1992) (*De Los Santos* turns on duty of ship's crew to intervene after stevedore has begun cargo operations); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 298 (5th Cir. 1984) (same).

ment of the off-loading stevedore's operations and the off-loading stevedore then acted unreasonably in the face of those conditions. If, as the vessel argues, the duty to turn over a vessel in safe condition does not include the cargo, then in *Taylor* we would not have determined that the cargo was not stored in a dangerous manner. We simply would have held that the vessel was immune as a matter of law from liability under a duty of safe condition theory because a cargo defect was the cause of the longshoreworker's injuries.

In *Taylor*, we concluded that the reason that the unloading longshoreman was not entitled to assert a claim against the shipowner under the turn over duty of safe condition was because

> [t]he torn sacks of beans, lying in the hold posed no threat; it was only when the cargo discharge began and the wind blew the beans on the deck and winch platform that a hazardous condition developed. Thus, it was not the torn sacks but the stevedore's subsequent failure to take appropriate precautions in the course of the operation that created the danger.

Id. at 1386.[10] *Taylor* is clearly distinguishable from the present case because there the stevedore-employer's own subsequent negligence created the hazard; here, it is the vessel's and the foreign stevedore's that is allegedly the cause. For the purpose of the case before us, both parties agree that the off-loading stevedore was not negligent in performing its cargo operations. Because it is undisputed for purposes of this appeal that the cargo was stowed negligently before the vessel was turned over to the off-loading stevedore, *Turner* and not *Taylor* is controlling.

[10]In *Taylor* we also rejected the longshoreworker's allegations that the vessel breached its post-turn over duties of intervention, active involvement, and control—duties not at issue here.

B. *A Vessel is Not Relieved as a Matter of Law From its Duty to Turn Over a Safe Cargo Stow Merely Because The Hazardous Condition is Open and Obvious.*

Turner establishes the proposition that the turn over duties of safe condition and of warning encompass *concealed* dangers in a cargo stow.[11] The remaining question is whether the fact that the defective condition of the cargo was open and obvious warrants a different result. The district court concluded that it did, and refused to allow Riggs' claim to go to trial. While Riggs agrees with the district judge that the turn over duty to *warn* applies only to hidden dangers, *see, e.g., De Los Santos*, 451 U.S. at 167; *Torres v. Johnson Lines*, 932 F.2d 748, 750 (9th Cir. 1991), he contends that the court erred in holding that the turn over duty of *safe condition* is similarly restricted.

[3] As we noted in our discussion of *Turner*, *supra* at 12715, *all* of the considerations on which we relied in holding that a vessel can be liable for concealed cargo defects are equally applicable in the case of open and obvious defects. The rationale underlying *Turner* simply does not permit the distinction suggested by the vessel. Moreover, we have explicitly held that the obviousness of a non-cargo defect does not absolve the vessel of its duty to turn over the ship in a safe condition—a condition under which expert and experienced stevedores can operate safely. *Martinez*, 903 F.2d at 609-10. In *Martinez*, we expressly held that an *open and obvious hazard* may be unreasonably dangerous and therefore constitute a breach of the turn over duty of safe condition. *Id.* In doing

[11]Fifth and Eleventh Circuit law is in accord with our own. E.g. *Lemon v. Bank Lines Ltd.*, 656 F.2d 110, 116 (5th Cir. Unit A. Sep. 1981); *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (per curiam). The Third Circuit takes the contrary position. *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987) (rejecting *Turner*), *cert. denied*, 486 U.S. 1007 (1988). We cited *Lemon* with approval in *Ollstead*, 738 F.2d at 1051.

so we rejected the argument that the duty of safe condition does not extend as a matter of law to open and obvious defects — at least insofar as the vessel and its equipment are concerned.[12]

[4] The vessel argues that the rule set forth in *Martinez* is limited to the ship and its equipment and that the duty of safe condition does not apply to "open and obvious" defective cargo stows. We disagree. We can think of no sound reason for drawing such a distinction in the case of cargo stows only.[13] The sensible principle *Martinez* enunciates is that a vessel's failure to "correct" an open and obvious defect may constitute unreasonable conduct leading to the imposition of liability. That principle has equal force with respect to hazards in the stowage and hazards occurring elsewhere on the vessel. Moreover, given that under *Turner* vessels already have a duty to supervise the on-loading operations of foreign stevedores to avoid non-obvious cargo defects, there would seem to be little extra burden in requiring them to be alert at the same time to the creation of cargo hazards that are open and obvious.

The vessel suggests that in the case of obvious dangers the longshoreworkers have the opportunity to make a conscious decision to refuse to unload or bring the defects to the attention of the stevedore or vessel. However, this argument is foreclosed by the fact that neither assumption of the risk nor

[12]As we noted earlier, *De Los Santos* expressly limits the duty to warn to hidden defects but does not place a similar restriction on the duty of safe condition. *See* 451 U.S. at 167. Other courts have recognized this distinction and allowed for actions for injuries caused by open and obvious defects under the duty of safe condition but not under the duty to warn. *See Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 852 & n.13 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 853 (1990); *see also Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985) (analyzing hidden versus obvious only as to the duty to warn).

[13]While it is true that *Martinez* does not refer to cargo, there is no reason that it should have done so since the case involved a defective ladder.

contributory negligence is a defense under the LHWCA. *De Los Santos*, 451 U.S. at 165 n.13. As the *De Los Santos* Court stated, a vessel may not defend a suit brought against it under section 905(b) on the ground that the injured longshoreworker should have refused to continue working in the face of an obviously dangerous condition. *Id.* at 176 n.22.

[5] For the foregoing reasons, we hold that a vessel has a duty to take the necessary steps to protect longshoreworkers against open and obvious cargo defects and not just concealed ones.[14] Our holding is in accord with the law of the Fifth Circuit on this question. *Woods v. Sammisa Co. Ltd.*, 873 F.2d 842, 848, 850 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 853 (1990); *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299-300 (5th Cir. 1984). As noted earlier, the Third Circuit takes the position that the turn over duty of safe condition does not encompass *any* cargo-stow defects, whether hidden or obvious. No circuit, however, has adopted a rule similar to that urged by the vessel — that a duty exists as to concealed cargo defects but not as to open and obvious ones. We see no reason to create further confusion in this already complicated area of the law by drawing such an untenable and artificial distinction. Therefore, we join the Fifth Circuit in holding that the duty of safe turn over encompasses open and obvious, as well as concealed cargo hazards.

[14]Of course, a plaintiff in a particular case may fail to produce at trial sufficient evidence of an unreasonable danger to support a finding of a *breach* of the turn over duty. *See Ludwig v. Pan Ocean Shipping Co., Ltd.*, 941 F.2d 849, 851-52 (9th Cir. 1991) (per curiam); *Bjaranson*, 873 F.2d at 1208-09. Because "certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them," *Torres*, 932 F.2d at 751 (internal quotation omitted), it may well be that a particular hazard that is open and obvious may not constitute an unreasonable danger to longshoreworkers. However, that factual issue is separate from the legal question whether there exists a duty to turn over a vessel that does not contain any unreasonably dangerous defects, cargo, or otherwise, open or concealed.

IV. *Conclusion*

Turner holds that the turn over duty of safe condition extends to concealed cargo defects. *Martinez* holds that that duty applies to open and obvious equipment (and vessel) hazards, as well as to concealed ones. We now complete the circle. Taken together, *Turner* and *Martinez* lead directly and inexorably to the conclusion that a vessel's turn over duty of safe condition extends to protecting against open and obvious cargo hazards. Accordingly, the judgment of the district court is **REVERSED** and the case **REMANDED** for further proceedings consistent with this opinion.[15]

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring:

I concur because the reasoning of *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), which holds that a vessel has the duty to protect longshoremen against concealed conditions created by a foreign stevedore, which the vessel could have corrected or warned of, leads inexorably to the conclusion that the vessel has a duty of care with respect to cargo conditions whether the dangers are concealed or not. I write separately to note that until now, the turn over duty has focused on the character of the ship and its equipment, not on the condition of the cargo. *See, e.g., Ludwig v. Pan Ocean Shipping Co.*, 941 F.2d 849 (9th Cir. 1991) (duty to have ship and its equipment safe for stevedore operations); *Taylor v. Moram Agencies*, 739

[15]The vessel argues that the award of summary judgment in its favor can be upheld on the basis that Riggs was hired to correct a dangerous stow and that under our decision in *Peters v. Titan Navigation Co.*, 857 F.2d 1342, 1344-45 (9th Cir. 1988), a repairman has no right to recover for injuries caused by the very condition he was hired to fix. The district court properly rejected this theory under the facts of this case.

F.2d 1384 (9th Cir. 1984) (vessel not liable for hazards which develop as a result of cargo operations). By the same token, the duty to warn has existed only with regard to hidden or concealed dangers. *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 415 U.S. 156 (1981); *Turner*, 651 F.2d at 1304. By imposing a turn over duty of care to protect stevedores from poor cargo conditions, we are exposing the shipowner to liability equally for lack of reasonable care as to the vessel or the vessel's equipment, and as to the condition of the cargo (at least when stowed by a foreign stevedore). It is unclear that this squares with the restrictive rules of liability of shipowners to stevedores envisioned by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), or with the scope of a shipowner's duties recognized in *De Los Santos*. In any case, should *Turner* have led us astray, either the Congress or the Court can set us straight.[1]

[1]Our decision aligns the Ninth Circuit with the Fifth, but the Third Circuit is to the contrary. *Contrast Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. Sept. 1981) (vessel liable for open and obvious defect in cargo storage) *with Deer v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1987) (vessel not responsible for open and obvious cargo storage hazards created by foreign stevedore), *cert. denied*, 486 U.S. 1007 (1988).

Excerpt from testimony of
Captain Daniel Cafena Campos

Q. Did you ever buy plastic for putting on decks in the course of -- for use in stowing cargo?

A. Yes, but to protect another type of cargo that would not be cocoa beans?

Q. What kind of cargo?

A. Drums of corrosive chemicals.

. . . .

Q. Is any cargo loaded in Guayaquil other than cocoa beans?

A. Bananas.

. . . .

Q. Have you ever seen a stevedore loading -- stevedore use plastic in the loading of cargo --

A. No.

Q. -- at all or just underneath cargo?

A. In this case, I have never seen a stevedore use plastic when loading cocoa beans. The ship mate would have ordered him to stop it immediately.

Q. Okay. We'll get to that in a second, captain. Have you ever seen plastic used in connection with the loading of other cargo on board a ship?

A. Affirmative.

Q. How about on board the PRESIDENTE IBANEZ?

A. Yes. But carrying, for example, in Houston, corrosive drums. IMO cargo.

. . . .

Q. Now, you testified that the longshoremen made the decision to put paper and wood underneath the cocoa beans?

A. Affirmative.

Q. Isn't it correct that if they did not do that, you would require them to do that?

A. They have to do it.

Q. So the ship requires them to do that?

A. The stevedores have to fulfill their jobs. If not, the agency would throw them out.

Q. But they do not have the authority to decide not to put the wood or paper under the cocoa beans, do they?

A. They have the decision to do it.

. . . .

Q. Let me rephrase the question. When you stated before that the longshoremen made the decision to put wood and paper under the cocoa beans, by that do you mean that they also had the authority to make the decision not to place wood and paper under cocoa beans?

A. No. I don't believe they had it.